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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO ALEJANDRO BARBOZA,

Defendant and Appellant.

G040266

(Super. Ct. No. 06CF2893)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Sylvia Whately Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Kelley Johnson, Deputy Attorney General, for Plaintiff and Respondent.

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There is sufficient evidence to support defendant's conviction for murder and street terrorism. We affirm.

## I

### FACTS

Defendant Antonio Alejandro Barboza was convicted of the first degree murder of Sam Chea. True findings were made that he vicariously discharged a firearm causing the victim's death and that he committed the crime for the benefit of a criminal street gang. He was also found guilty of street terrorism. The court sentenced defendant to 40 years to life in prison.

Daniela H. was 14 years old when she testified in May 2007. The previous September 11, she was waiting with a friend outside Century High School for Oscar Gonzalez,<sup>1</sup> who was the "boyfriend of [her] friend." Daniela said "he was taking a long time coming to pick us up so, we started walking and that's when we saw him that he was being jumped by a lot of people." She said, "a lot of guys like six of them, seven they were just punching him, kicking him." She said the attackers were Asian.

When Daniela and her friend arrived at the scene, the "Asian individuals" started running. Oscar Gonzalez was bleeding "from his ribs."

Santa Ana Police Officer Jesus Delabarcena was assigned to the gang suppression detail when he was dispatched to Century High School on September 11, 2006. He said "there was a crime scene set up for a stabbing incident that had occurred."

Oscar Gonzalez's older brother, Sergio Gonzalez, was already at the scene when Delabarcena arrived. Gonzalez "appeared to be very angry and upset." Delabarcena saw him hug his mother and heard him say to her, "don't worry, I know who did it, it was Chinos." Gonzalez made a telephone call from his mother's cell phone.

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<sup>1</sup> Two persons with the last name of Gonzalez are discussed here. We use full name for Oscar Gonzalez. For Sergio Gonzales, we use only his last name.

Abel H. was 13 years old when he testified. He was in custody in juvenile hall, charged with murder, and testified under a grant of immunity. He said Oscar Gonzalez was his friend before he died, and Gonzalez is also his friend. The prosecutor asked whether or not Abel ever heard of a gang called Little Minnie Street, and he replied, "I kicked in with them."

After Abel heard that Oscar Gonzalez had been stabbed, he went to "some little dead end" on Minnie Street. The prosecutor asked: "So, how many of you guys are down there talking about doing pay back?" Abel said "some," and that he didn't know if there were five or 10.

The prosecutor asked Abel to tell the jury about the shooting and he refused. When he was asked why, he responded, "Because I'm not a rat." The prosecutor reminded him he already told the story to "the cops," and Abel said, "I know but I'm not going to here." But he did state that he was "being truthful with the police."

Abel also testified defendant was present before the shooting to talk about "getting payback." After they talked, Abel and other Little Minnie Street gang members, including defendant, walked to the scene of the shooting.

Santa Ana Police Detective Charles Flynn interviewed Abel two times. One of those interviews occurred on September 13, 2006. Abel told Flynn, "that when he, Mr. Barboza and Mr. Gonzalez had initially gotten together on the tracks that Mr. Gonzalez produced a chrome colored .38-caliber handgun with a black handle that he ultimately opened it up and counted out three rounds." Abel heard Gonzalez say he was going to kill someone.

Abel told Flynn defendant was a Little Minnie Street gang member. Flynn said he showed Abel some photographs which were taken from defendant's bedroom "on a search warrant." Four of them showed defendant either making gang signs or having a chrome colored revolver in his hand or waistband. Abel identified the gun in the photographs as the same one used in the instant murder.

Abel told Flynn the Little Minnie Street gang did not get along with the We Don't Care gang (WDC). Abel said five of them, Abel, defendant, Gonzalez and two others, approached the victim's vehicle. Abel related to the detective that Gonzalez "hit-up" the victim through the open window and that then "Sergio reached into his waistband with his right hand, produced a revolver, that he saw him with earlier, and fired three rounds into the victim."

Phany Sam was 18 years old and in high school when she testified. On September 11, 2006, she lived on Minnie Street. At that time, she knew a friend of her brother's named Sam Chea who was also known as Midget. Sam Chea was involved with the WDC gang. When she was asked if she belonged to the WDC gang, Phany responded that she "used to claim it," but not anymore.

Phany saw a group of people surrounding a car; Sam Chea was in the front passenger seat. Phany said, "I saw them blasting, that's about it." The shooter "picked up his shirt, I think, and pulled [the gun] out."

Matthew McLeod is Detective Flynn's partner. He is attached to the gang homicide detail.

McLeod interviewed defendant on September 13, 2006. Defendant said in the interview that when Gonzalez "came home from the hospital, he went to a location within his residence and got what [defendant] believed was a gun." As defendant walked toward the scene with the group, he heard Gonzalez say he was going to "blast those fools." McLeod said defendant said he was at the scene of the shooting "to exact . . . revenge for what had happened to the victim of a stabbing." He told the detectives "he knew that there would most likely be a shooting" and that it would be in retaliation for Oscar Gonzalez's stabbing. Defendant admitted to the detectives he was there "to backup Sergio." Defendant said that backup means that when you see someone getting in trouble, "you're going to help them out."

Defendant said Gonzalez was a member of the Little Minnie Street gang. He said just prior to the shooting, the shooter asked the victim about his gang affiliation, and the victim answered, “WDC.” Defendant said “Sergio Gonzalez shot the gun.”

David Rondou is a police officer with the Santa Ana Police Department. He testified as a gang expert. He confirmed that the victim of the shooting, Sam Chea, was a WDC gang member. The WDC gang is allied with the Tiny Rascals gang (TRG). The persons arrested for the stabbing of Oscar Gonzalez are TRG gang members. He also confirmed that the victim of the stabbing, Oscar Gonzalez, as well as his brother Gonzalez, were Little Minnie Street gang members. Rondou said, based on various documents, photographs and conversations, defendant is a member of the Little Minnie Street gang. Regarding the relationship between the Little Minnie Street gang and WDC, Rondou said: “They didn’t have an everyday blood spill, but they weren’t allies.”

The expert said the primary activities of the Little Minnie Street gang are “various assaults ranging from a beating to a homicide and auto thefts.” Rondou testified that a John C. is “a self-admitted Little Minnie Street gang member” who was found to be a “minor in possession of a firearm.”

Rondou said: “Payback is what we have used here in this case. There’s a perceived disrespect that being a Little Minnie Street member was jumped and stabbed, ultimately died, and payback is going back to the neighborhood that’s believed to have been involved in that assault and payback someone in that neighborhood, not necessarily the person that did the first act, anybody from the neighborhood that’s believed to be a gang member from that neighborhood will do.” He said a hit-up has a few meanings: “It’s used as a challenge. It’s used to identify who these guys are talking to. Typically, if a member comes across each other, they may not know where this person is from, they want to verify whether they will be a rival or an ally.”

The prosecutor asked Rondou a hypothetical question which included hypothetical facts the same as the instant facts and asked him whether the hypothetical

shooting was done for the benefit of a criminal street gang. Rondou said it was and explained: “It’s done in association. You have three or multiple Little Minnie Street gang members involved in arming themselves and going down and shooting and killing a rival gang member following a hit-up.” He also said the hypothetical murder was done to promote, further or assist criminal conduct on behalf of the Little Minnie Street gang, and explained: “Well, in the gang subculture, when there’s a disrespect, that being one of the members being jumped and ultimately stabbed and killed, that is a huge disrespect. And the retaliation to that, to that disrespect or perceived disrespect or the killing would heighten the reputation of the Little Minnie Street within the gang world, that if you mess with the Little Minnie Street gang member, we’re coming back and we’re going to answer that call with at least the amount of disrespect that was given our way or greater. So the reputation of the gang and the members of the gang that committed that homicide, their reputation would sky rocket.”

## II

### DISCUSSION

#### *Sufficiency of Evidence, Murder*

Defendant argues both convictions must be reversed because there was insufficient evidence of requisite criminal conduct. “‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “‘upon no hypothesis whatever is there sufficient substantial evidence to support’” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant claims a lack of sufficiency of the evidence that he aided or abetted the shooting. To establish defendant's liability as an aider and abettor, the prosecution was required to prove defendant knew of Gonzalez's unlawful purpose, and intended to and did aid, facilitate, promote, encourage, or instigate Gonzalez's commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) Presence at the scene of a crime, without more, is insufficient to establish aiding and abetting liability. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

Both defendant and Gonzalez were active members of the Little Minnie Street gang. Earlier in the day, Gonzalez's brother, Oscar Gonzalez, who was also a member of the Little Minnie Street gang, was stabbed by a member of the TRG gang. The TRG gang is allied with the WDC gang. The victim, Sam Chea, was a member of the WDC gang. Immediately after the stabbing, defendant and other Little Minnie Street gang members met to talk about getting "payback" and "exact revenge" for the stabbing. Gonzalez displayed a gun and announced he was going to kill someone. After the discussion, several Little Minnie Street gang members, including defendant, walked to the scene of the shooting. Defendant heard Gonzalez say he was going to shoot someone. Defendant told the police he knew there would be a shooting and that he was present to act as backup for Gonzalez. Later, the police found a photograph showing defendant holding the gun used to kill Sam Chea. From this record, we conclude there is a sufficiency of evidence to show defendant acted as an aider and abettor to the murder.

#### *Sufficiency of Evidence, Street Terrorism*

Defendant contends there is insufficient evidence to support his conviction for aiding and abetting street terrorism because "neither presence at the scene nor the failure to prevent the crime, standing alone, is sufficient to establish aiding and abetting."

Penal Code section 186.22, subdivision (a) . . . “is a substantive offense whose gravamen is the *participation in the gang itself*.” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.) Penal Code section 186.22, subdivision (a) applies both to the perpetrator and an aider and abettor. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Expert testimony about gang culture and whether a particular felony was committed for purposes of promoting or benefiting a gang may be relied upon so long as it is based on evidence presented at trial. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

Here defendant admitted he participated in payback discussions and that he went to the scene of the murder in order to act as backup for Gonzalez who told him he intended to kill someone. Based on this evidence as well as upon the gang expert’s testimony and other evidence, the jury could have reasonably concluded defendant committed street terrorism.

### III

#### DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.